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IN THE

Supreme Court of the United States

October Term, 1950.

No. 5, Original.

STATE OF NEW JERSEY,
Complainant,

against

STATE OF NEW YORK and CITY OF NEW YORK,
Defendants,

COMMONWEALTH OF PENNSYLVANIA,
Intervenor.

MOTION OF THE STATE OF DELAWARE FOR LEAVE TO INTERVENE AND TO FILE THE ANNEXED ANSWER TO THE AMENDED PETITION OF THE CITY OF NEW YORK FOR MODIFICATION OF DECREE AND CONSENT OF THE PARTIES HERETO.

H. ALBERT YOUNG,
Attorney General,

VINCENT A. THEISEN,
Chief Deputy Attorney General,

Attorneys for the Petitioner, the State of Delaware.

International, 236 Chestnut St., Phila. 6, Pa.

IN THE

Supreme Court of the United States.

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STATE OF NEW JERSEY,

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against

STATE OF NEW YORK AND CITY OF NEW YORK,

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Intervenor.

MOTION OF THE STATE OF DELAWARE FOR LEAVE TO INTERVENE AND TO FILE THE ANNEXED ANSWER.

The State of Delaware, acting through its attorneys, H. Albert Young, Attorney General, and Vincent A Theisen, Chief Deputy Attorney General, moves this Court for an order permitting it to intervene herein and file its answer in intervention, a copy of which said answer is attached hereto.

This motion is based upon the following grounds:

(1) That the State of Delaware is one of the original States of the United States of America, having its Capitol in the City of Dover, Kent County, Delaware. Petitioner is charged as *parens patriae* with the duty of promoting and safeguarding the interests and welfare of its citizens and

the protection of property within its territorial limits; and in particular, those citizens living in or having interests in and to property situated in the basin and watershed area of the Delaware River.

(2) That the Delaware River is an interstate stream rising in the highlands of New York and Pennsylvania and constitutes in part the boundaries dividing the State of New York and the Commonwealth of Pennsylvania and constitutes the boundaries between the State of New Jersey and the Commonwealth of Pennsylvania, and also in part the boundary between the State of New Jersey and the State of Delaware.

(3) That within the territorial limits of the State of Delaware, there are located in the basin and watershed areas of the Delaware River and its tributaries many cities, towns, and villages as well as vast agricultural and industrial areas with a population of approximately 340,000 persons. This great agricultural, industrial and municipal community has shown a substantial and continuous growth over a period of many years and is certain to continue its growth in the future. The waters of the Delaware River and the waters of its watersheds have supplied in the past, and are now supplying, the needs of many of the communities and population of the State of Delaware. It is of vital importance to the continued growth and prosperity of the State that the waters of the Delaware River shall be available in adequate quantity and suitable quality, for the future reasonable water needs and requirements of said agricultural, industrial, municipal area and community.

(4) That in addition to the agricultural, industrial and municipal uses referred to in the preceding paragraph, the State of Delaware, like the State of New Jersey, has a large oyster industry in which thousands of dollars are invested and low water flow will cause marine enemies of the oyster to destroy such industry. The natural beds of the Delaware River and the Delaware Bay exist in their

present location because of the contribution made to the biology of the oyster by fresh water discharge in the Delaware River and high spring flow serves to keep the enemies of the oysters from establishing a permanent foothold there. Hence, oysters are able to attach and grow to a size suitable for transplanting unmolested by enemies and planted beds enjoy conditions favorable to the maturing of the oysters by reason of the influence of fresh water discharged first, by holding back the flood tide and diluting the more saline waters; and, second, the effect of river discharge diluting off-shore waters from which the flood tide is drawn. The diversion of water as proposed by the petitioner may remove from the Delaware River basin fresh water needed

(1) to supply low salinity and chemicals necessary for attachment of oyster larva;

(2) to bring about reaction to the ebb and flow of tides which will carry larva upstream to natural beds;

(3) to supply food to the oysters;

(4) to limit the sphere of activity of marine enemies;

(5) to supply heat needed for the purpose of development of the eggs;

(6) to reduce the flow of the river and reduce the salinity in a mass of water detrimental to the oyster industry.

The oyster industry has existed in Delaware for more than two centuries and is the sole means of support of those communities in the State of Delaware in which it is carried on.

(5) That in addition to the aforesaid, the State of Delaware contains within its borders and contiguous to the Delaware River, vast areas of marsh land constituting an excess of 8% of the total land area of the State. In these marsh lands there presently thrives a large muskrat

industry. Resident trappers of the State of Delaware harvest an average of 150,000 muskrats per year, earning an annual income which is estimated to be in excess of $200,000.00. The marsh lands are also inhabited by many species of water fowl and constitute an important wintering ground for an average of 60,000 water fowl each year. These flocks supply recreation for nearly 6,000 sportsmen who spend an estimated $225,000.00 annually in the State of Delaware in the pursuit of their sport.

(6) The number of muskrats and water fowl which are to be found in the marshes of the State of Delaware is dependent upon the quality and quantity of food and cover grown on said marshes. This in turn depends largely upon the quality and quantity of fresh water which supplies such marshes. The waters of the Delaware River and Delaware Bay contain various amounts of salt depending upon the quantity of fresh water intake to the north and the salt water intake to the south. The resulting product of these two sources of water is a gradual blending measured by a salinity gradient which ranges from nearly fresh water on the northern boundary of Delaware on the Delaware River to full sea salinity near Cape Henlopen on the southern border of the State of Delaware. The gradient varies as the fresh and salt water flow vary. The distribution of marsh plants, the food supplies of water fowl and muskrat is the key to the abundance of such wild life. Higher quality food plants are found more commonly in the fresher water and consequently the muskrat and water fowl population varies in an almost inverse proportion to the amount of salinity. The growth of food supplies for water fowl and muskrat is dependent in large measure upon the availability in early Spring of each year of fresh water supplies during the period of germination and early growth of such plants. Thus, it is essential not only to the oyster industry but also to the wild life and muskrat industries conducted in the State of Delaware, that a free

flow of fresh water be assured to supply low salinity in order to permit the growth of marsh plants which constitute the food supplies of the muskrats and water fowl found in the State of Delaware during the critical Spring period, during which such marsh plants are in their period of germination and early growth. A diversion of the flow of the Delaware River during such Spring months could have a disastrous effect upon both such industries, and would thereby cause irreparable harm and damage to the owners of such marsh lands, who have over the years earned therein vast sums of money which have provided for the support of many of the communities of this State.

(7) In addition to the above, there are contained within boundaries of the State of Delaware and located along the Delaware River and Delaware Bay large areas providing recreation for the citizens of this State, which are dependent upon the free flow of the Delaware River for the preservation of such recreational facilities of the State of Delaware. The proposed diversion of the waters of the Delaware River will deprive the State and its citizens, who are riparian owners of not only such recreational facilities, but also will injuriously affect the sanitary conditions of the river and will lower the level of the water of the river to the injury of those seeking to use the river and lands adjoining for recreational purposes.

(8) The State of Delaware was not a party to the original proceedings which were instituted in this Court, which resulted in the decree of this Court made and entered in the above entitled cause on May 25, 1931 (October Term, 1930, original #16, 283 U. S. 805). Intervention was not sought in the original proceedings on behalf of the State of Delaware because it was apparent from the complaint which was filed on behalf of the State of New Jersey and the Statement of Interest of the Commonwealth of Pennsylvania, as an intervenor, that the interests of the State

of Delaware were substantially those of the State of New Jersey and the Commonwealth of Pennsylvania and that the State of Delaware would receive adequate and substantial protection from the representation of New Jersey and Pennsylvania.

(9) When leave was granted to the City of New York by order of this Court entered June 9, 1952 to seek a modification of the aforesaid decree of this Court, answers were filed on behalf of the State of New Jersey and the Commonwealth of Pennsylvania which again stated in substance the position of the State of Delaware.

In substance, the answer filed on behalf of the State of New Jersey stated that New Jersey would not object to the increase of waters for the City of New York if this Court by its decree will designate the amount of water to be released by the City of New York impounded by its plan as set forth in its petition, in order to supply sufficient water to the State of New Jersey for potable and industrial purposes and to protect oysters and wild life and recreational facilities of the State of New Jersey. New Jersey further requested this Court to establish the formula for released waters in accordance with the provisions of Chapter 283, Laws of 1951 of New Jersey and Chapter 701, Laws of 1952 of New York, and in accordance with the formula provided for in the Compact for the development of the Delaware River waters adopted by the Legislatures of the States of New York, New Jersey and Delaware, commonly known as the Incodel Plan for the development of the Delaware River waters. The answer filed on behalf of the Commonwealth of Pennsylvania in substance denied the need of the City of New York to an increased diversion of the waters of the Delaware River, and prayed that this Court dismiss the petition to modify the decree entered herein on May 25, 1931.

(10) Thus, the answers which were filed by the State of New Jersey and the Commonwealth of Pennsylvania to

the New York City petition for modification appeared to be compatible with the position which would be assumed by the State of Delaware, and did not appear to be adverse to the interests of the State of Delaware. Consequently, the State of Delaware has not filed a petition to be allowed to intervene in these proceedings at an earlier date for the reason that it appeared evident that the interests of the State of Delaware would be adequately protected in these proceedings.

(11) It has, however, now become apparent that during recent months negotiations have been carried on by the representatives of the State of New York, the State of New Jersey, the Commonwealth of Pennsylvania and the City of New York, which are designed to effectuate a compromise of the controversy. As a result of these negotiations, the City of New York, with the consent of the other sovereign States, has filed herein an amended petition to modify the decree of this Court of May 25, 1931. In substance, the amended petition seeks an increased diversion of the waters of the Delaware River or its tributaries from the equivalent of 440 million gallons of water daily to the equivalent of 490 million gallons of water daily prior to the completion of the Cannonsville reservoir and to the equivalent of 800 million gallons of water daily after the completion of the Cannonsville reservoir. The amended petition also seeks to modify the release formula contained in subdivision (b) of paragraph "1" of said decree, using the Montague Gaging Station, near Montague, New Jersey, as the control point instead of the Trenton Gaging Station at Trenton, New Jersey, as prescribed by the decree of May 25, 1931.

(12) The answer of the State of New Jersey to the amended petition of the City of New York takes the position that the City of New York should be permitted to make the diversion conditioned upon adequate release flows for the State of New Jersey and other interested States, and approves the proposed release formula in paragraph 21

of the amended petition on the ground that it will substantially improve the flow of the river during dry periods and thereby provide substantial quantities of water to be made available for the State of New Jersey "and other states having a common interest in the river". (Paragraph 16 of the New Jersey Answer). Beginning in paragraph 25 of the New Jersey answer to the amended petition, it is stated that the Delaware River was and is the main source of water supply of the Delaware and Raritan Canal and feeder, which extends from Raven Rock on the Delaware River to New Brunswick on the Raritan River. Approximately, 200,000,000 gallons of water a day were alleged to have been diverted from the Delaware River for the purposes of navigation which were not returned to the river but which were reverted to the Delaware watershed. New Jersey further alleges that at the present time approximately 30,000,000 gallons daily or more are used for commercial or industrial purposes in said canal, and claims an historical right of 200,000,000 gallons daily from the Delaware River, which diversion is made from the Delaware River below the point of diversion proposed in the New York City plans. New Jersey, therefore, alleges that it has an immediate need in excess of 100,000,000 gallons daily without compensation releases from the Delaware watershed, as a part of its fair and equitable share of the waters of the Delaware River.

(13) Thus, the New Jersey answer to the amended petition seeks to establish a so-called historical right to divert without compensation 200,000,000 gallons daily from the Delaware River and to establish an immediate right to divert 100,000,000 gallons of water daily without compensating releases. Such diversion is to be made from the Delaware River below the point of measurement proposed in the New York City plans at Montague, New Jersey. These contentions advanced on behalf of the State of New Jersey for the first time in answer to the amended petition

has made it apparent that the State of Delaware is no longer able to rely upon the representation of its interests by the State of New Jersey and makes it necessary for the State of Delaware to petition this Court for the right to intervene in these proceedings to protect the rights and interests of the State of Delaware and of its citizens.

(14) The answer of the Commonwealth of Pennsylvania to the amended petition of the City of New York takes the position that it will not oppose the additional diversion of the waters of the Delaware River as prayed for by the City of New York, subject to certain conditions which are more fully set forth in paragraph 30 of its answer to the amended petition. In paragraph 29 thereof, Pennsylvania avers that it is informed that New Jersey in its answer will ask permission to divert out of the Delaware River watershed, without compensating releases the equivalent of 100 million gallons daily through the Delaware and Raritan Canal. It is alleged that in consideration of the enactment by the State of New Jersey of a law which revoked a Compact of 1783 barring the erection of dams across the river and specifically giving Pennsylvania permission to construct a storage reservoir to Wallpack Bend, and a diversion dam at either Yardley, Pennsylvania, or at Brookville, Pennsylvania, the Commonwealth of Pennsylvania makes no objection to the granting of the permission which New Jersey seeks to divert 100 million gallons of the water from the Delaware River, provided such additional diversion is subject to the conditions that any party to these proceedings may apply at the foot of the decree for other or further action or relief, and that this Court would retain jurisdiction for the purpose of any order or direction or modification of the decree or any supplemental, which may be deemed to be proper in relation to the subject matter in controversy.

Thus, it has become apparent from the answer filed on behalf of the Commonwealth of Pennsylvania to the amended petition, that such State has now assumed a position that may be wholly incompatible and adverse to that

of the State of Delaware, so that the State of Delaware should be permitted at this time to intervene on its own behalf in order to protect the interests of the State of Delaware and its citizens.

THEREFORE, your petitioner, as *parens patriae,* representing the interest and welfare of all of its citizens who reside in the basin and watershed area of the Delaware River and its tributaries and who depend upon the waters of the said river and its tributaries for their present and future reasonable requirements of water for domestic, municipal, sanitary, industrial and power purposes, and for the protection of its oyster and wild life industries and its recreational facilities, and in the performance of its duty to protect such citizens and their aforesaid property rights, now presents this petition for leave to intervene in the above entitled original proceedings in this Court, the consent to this motion having been obtained by Delaware from all of the parties hereto, the same being annexed to this motion as Exhibit A.

WHEREFORE, your petitioner prays that it may be permitted to intervene herein, that it be permitted to participate in any and all proceedings and hearings before the Special Master upon the reference order of June 9, 1952, offering such evidence as it may deem necessary and/or appropriate and relevant, and that it further be permitted to participate in any proceedings or hearings before this Court upon the report of the Special Master; and for such other and further relief as this honorable Court may deem proper and necessary.

And your petitioner will ever pray, etc.

THE STATE OF DELAWARE,
Petitioner,

By H. ALBERT YOUNG,
Attorney General,

VINCENT A. THEISEN,
Chief Deputy Attorney General.

IN THE

Supreme Court of the United States.

October Term, 1950.

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STATE OF NEW JERSEY,

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STATE OF NEW YORK AND CITY OF NEW YORK,

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COMMONWEALTH OF PENNSYLVANIA,

Intervenor,

STATE OF DELAWARE,

Intervenor.

ANSWER OF THE STATE OF DELAWARE TO AMENDED PETITION OF THE CITY OF NEW YORK TO MODIFY DECREE.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Now Comes the State of Delaware (hereinafter called "Delaware") by H. Albert Young, its Attorney General, and Vincent A. Theisen, its Chief Deputy Attorney General, and files this separate answer as intervenor to the amended petition (hereinafter called the "amended petition") of the City of New York (hereinafter called "petitioner") to modify decree, and in answer thereto respectfully represents as follows:

(1) Delaware admits that petitioner seeks modification of the decree of this Court as averred in paragraph 1 of the amended petition, but Delaware objects to the modification of this Court's decree of May 25, 1931 unless adequate

compensation release flows are provided to augment the low flow of the Delaware River be made by the City of New York.

(2) Delaware admits the averments contained in paragraph 2.

(3) Delaware admits the averments of paragraph 3 of the amended petition but avers that the decree of May 25, 1931 (283 U. S. 805) was based upon the finding of the Special Master, affirmed by this Court, that the proposed diversion of 600 million gallons daily by petitioner was excessive and that any diversion by the City of New York in excess of 440 million gallons daily under the release formula adopted by this Court would cause serious injury and substantial damage to the State of New Jersey and the Commonwealth of Pennsylvania, the interests of which were and are substantially the same as Delaware; and, consequently, the diversion of more than 440 million gallons of water daily from the Delaware River would cause serious injury and substantial damage to Delaware and its citizens and would deprive Delaware of a greater part of the benefits of the Delaware River than Delaware should be expected, in all equity, to yield to the other States having a common interest in the River.

Delaware is entitled to the use, enjoyment and appropriation of the waters of the Delaware River based upon the principle of fair and equitable apportionment of the waters and, as a sovereign State, has a substantial interest in the protection of such rights as may be affected by the present litigation or by any future application for further action for relief in this Court.

(4) Delaware admits the allegations of paragraph 4.

(5) Delaware admits that the consumption and use of water in the City of New York has increased since the entry of the decree of May 25, 1931, but does not admit that such consumption and use has reached the critical point where at present the existing New York water supply facilities are over-taxed. Delaware recognizes that it is the

duty of every State to plan, build and construct the water supply facilities which each State estimates it may need to meet its future anticipated increased population and industrial water demands, but avers that the growth and industrial development of the State of Delaware indicates an equal or greater need at the present time than that of the City of New York. Respondent avers that its need for immediate water developments is equally as critical as that of the City of New York but believes that the solution of the problems confronting all of the parties to these proceedings is to be found in cooperation among the States having a common interest in the Delaware River by taking into consideration its present and future reasonable needs but without unduly injuring the flow of the River.

(6) Delaware is without information sufficient to enable it to admit or deny the present dependable safe yield of the water system of the petitioner, but avers that the City of New York has vast water facilities available to the City of New York other than the Delaware River.

(7) Delaware is without sufficient information to form a belief as to the allegations of paragraph 7 but avers that the droughts of 1949 and 1950 were extremely unusual and that the rain falls since 1950 have restored to normal the average storage in the existing reservoirs.

(8) Delaware is without sufficient information to form a belief as to the allegations of paragraph 8 and therefore leaves petitioner to its proofs thereof.

(9) Delaware is without sufficient information to form a belief as to the allegations of paragraph 9 and therefore leaves petitioner to its proofs thereof.

(10) Delaware is without sufficient information to form a belief as to the allegations of paragraph 10 and therefore leaves petitioner to its proofs thereof.

(11) Delaware is without sufficient information to form a belief as to the allegations of paragraph 11 and therefore leaves petitioner to its proofs thereof.

(12) Delaware is without sufficient information to form a belief as to the allegations of paragraph 12 and therefore leaves petitioner to its proofs thereof.

(13) Delaware is without sufficient information to form a belief as to the allegations of paragraph 13 and therefore leaves petitioner to its proofs thereof.

(14) Delaware is without information sufficient to enable it to admit or deny the averments of paragraph 14 of the amended petition but avers that the release works of the City of New York, if the prayer of its petition be granted, should be of such capacity as to insure the specified releases under all circumstances of reservoir depletion.

(15) Delaware is without sufficient information to form a belief as to the allegations of paragraph 15, but alleges that the petitioner has many alternate and unlimited supplies of water other than the Delaware River and its tributaries while Delaware, on the contrary, because of its geographical and topographical features is much more limited in obtaining water from sources other than the Delaware River. Delaware, therefore, alleges that any future water developments other than that applied for by the petitioner should be made from sources other than the Delaware River Basin in order that the rights and needs of the State of Delaware and the other states having a common interest be fairly and equitably preserved and allotted.

(16) Delaware is without sufficient information to form a belief as to whether the development of the West Branch of the Delaware River as proposed by the petitioner, will not substantially affect adversely the interests of the various states involved. Delaware avers that with the growth of industry and population within its borders and the further exploitation of its industries and recreational facilities, the time may come when the diversion which is sought by the petitioner would substantially dam-

age Delaware. Delaware admits that the proposed release formula set forth in paragraph 21 of the amended petition may minimize the damage to Delaware and may substantially improve the flow of the river during dry periods, and thereby provide substantial quantities of water to be made available to Delaware and the other states having a common interest in the river, but is without sufficient information or knowledge to form a belief as to whether the proposed release formula is just and necessary in accordance with the principles previously adjudicated by this Court or that the quantities of water which will be released will be of great and lasting benefit to the users of the Delaware River.

Delaware admits that the waters of the Delaware River and its tributaries are of such quality that if properly conserved and regulated they will be sufficient to meet all the needs, present and future, of the parties hereto and their municipalities and citizens, but is without sufficient information to form a belief as to whether the proposed diversion can be maintained in perpetuity. Thus, Delaware may be required in the future to apply to this Court to have the proposed diversion wholly or partially eliminated or to require the petitioner to make more substantial releases than those it now proposes to make.

(17) Delaware is without sufficient information to form a belief as to the averments of paragraph 17.

(18) Delaware is without sufficient information to form a belief as to the averments of paragraph 18.

(19) Delaware admits the averments of paragraph 19.

(20) Delaware admits the averments of paragraph 20.

(21) Delaware admits the averments of paragraph 21, but objects to the modification in the following respects:

(a) The minimum uniform basic rates of flow, as set forth therein, should under no circumstances be merely "within practicable limits" but should be a

fixed commitment to be a first charge against the water impounded in the petitioner's reservoirs and to be maintained during every day of each year.

(b). The requirements contained in Section A of the proposed release formula should not be limited by the capacity of New York City's release works. On the contrary, New York City's release works should be so constructed as to insure the release of the quantity of water set forth.

(22) Delaware admits that the proposed water release formula will enable and require the petitioner to release more water during periods of particularly low stream flows, resulting in more beneficial water conditions in the Delaware River and its tributaries below the points of diversion, but denies that all of the waters released will enure to the benefit of the States, municipalities or of other users of the waters of the Delaware River, if the State of New Jersey or the Commonwealth of Pennsylvania are permitted to divert without compensating releases any quantity of water from a point below the point of diversion proposed in the New York City plans.

Making further answer, Delaware denies that any of the parties to these proceedings is entitled, either through alleged historic rights or by virtue of any prior appropriation, to any superiority of right over the State of Delaware to the use of the waters of the Delaware River. Delaware denies that New Jersey is entitled to divert, without adequate compensation releases, the natural flow of the Delaware River or its tributaries and objects to any adjudication which would establish the right of New Jersey or Pennsylvania to divert the natural flow of the Delaware River from any point in the river which is below the gaging station, which may be established by decree of this Court as a measuring point for the releases provided in any decree that may be entered herein. However, at the present time, Delaware is unable to show that the proposed diver-

sion of the State of New Jersey will result in substantial injury and damage to the State of Delaware and, consequently, do not at this time challenge the prayer of the State of New Jersey to divert without compensation the equivalent of 100 million gallons of water per day out of the Delaware Watershed, providing that any decree entered herein shall incorporate a provision that such diversion shall not constitute a prior appropriation by the State of New Jersey.

(23) Delaware admits, with the modifications requested in paragraph 21 of this answer, that the proposed water release formula is and would be presently preferable to that contained in the decree of May 25, 1931. Further answering, Delaware avers that it has a substantial and vital interest in the future development of the Delaware River watershed; that while Delaware is not prepared to aver at this time that the proposed diversion by the petitioner, and/or the State of New Jersey, and/or the Commonwealth of Pennsylvania will result in irreparable harm and injury being sustained by Delaware, such future development of the Delaware River basin within the borders of Delaware may require that whatever diversion or diversions which may be granted in these proceedings be amended or eliminated. Delaware, therefore, urges that this Court reaffirm the intent of the decree of May 25, 1931 that any diversion by the City of New York or the other parties to these proceedings shall not constitute a prior appropriation, and that this Court decree that any diversion by the petitioner, the State of New Jersey or the Commonwealth of Pennsylvania, shall not be construed to give any superiority of right over the State of Delaware in the enjoyment and use of the Delaware River and its tributaries. Delaware requests that this Court establish that each of the parties hereto is entitled to a fair and equitable share of the waters of the Delaware River and its tributaries; that because Delaware is located geographically at

the lowest point in the river with respect to the other parties to these proceedings and has an equal interest in the development of the Delaware River Valley with that of Pennsylvania and New Jersey, none of the diversions which may be provided for in the decree entered herein shall unduly injure the rights of the State of Delaware, and that in the event of any undue injury as a result of any diversion, that Delaware shall have the right to petition this Court for relief.

(24) Delaware admits the averment of paragraph 24.

(25) Further answering, Delaware states that in view of its inability to show present damage by reason of greater diversions by New York accompanied by substantially greater releases, it does not object to the granting of the permission sought by New York subject, however, to the inclusion in the modified decree of each and all of the following conditions:

(a) The diversion of water in any quantity by New York from the Delaware River watershed shall not be deemed a prior appropriation; and any modified decree in this case shall not be construed as increasing New York's fair and equitable share of the waters of the Delaware River beyond 440 million gallons daily.

(b) Notwithstanding any expenditure made by New York City to construct the Cannonsville Reservoir and appurtenances, Delaware's failure now to object shall never estop Delaware from requesting this Court further to modify the decree in such a way as to prevent damage to Delaware including if necessary the complete discontinuance of the additional diversion for which New York City is now requesting authority.

(c) The release formula set forth in paragraph 21 of the amended petition shall be modified as requested in paragraph 21 of this answer.

(d) This Court shall appoint a River Master to police the use of the River and to see to it that the diversions are not exceeded and that the releases are made as ordered by this Court, such River Master to perform such other duties as from time to time the Court shall direct in connection with the use of the waters of the River and its tributaries by New York, New Jersey, Pennsylvania and Delaware.

(e) The decree shall continue to contain the substance of paragraph 6 of the present decree as follows:

> "6. Any of the parties hereto, complainant, defendants or intervenor, may apply at the foot of this decree for other or further action or relief and this court retains jurisdiction of the suit for the purpose of any order or direction or modification of this decree, or any supplemental decree that it may deem at any time to be proper in relation to the subject-matter in controversy."

(26) Unless the foregoing conditions can be included, Delaware vigorously opposes any modification of the decree of May 25, 1931, as requested by New York City, for the reason that the additional diversion sought by New York City will undoubtedly cause serious damage to Delaware's interests in the future.

Respectfully submitted,

H. Albert Young,
Attorney General of the State of Delaware,
Solicitor for the Intervenor.
Vincent A. Theisen,
Chief Deputy Attorney General.

EXHIBIT A.

IN THE

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October Term, 1950

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STATE OF NEW JERSEY,
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STATE OF NEW YORK AND CITY OF NEW YORK,
Defendants,

COMMONWEALTH OF PENNSYLVANIA,
Intervenor,

STATE OF DELAWARE,
Intervenor.

CONSENT OF THE CITY OF NEW YORK, THE STATE OF NEW YORK, THE STATE OF NEW JERSEY AND THE COMMONWEALTH OF PENNSYLVANIA.

The State of New Jersey, Complainant herein, the State of New York and City of New York as defendants herein, and the Commonwealth of Pennsylvania as intervenor, having given the most careful consideration to the motion of the State of Delaware for leave to intervene and to file the annexed answer to the amended petition of the City of New York for modification of the decree made and entered herein on May 25, 1931, and believing that the State of Delaware has an interest in the Delaware River and any decree relating thereto, the State of New Jersey, the State of New York, the Commonwealth of Pennsylvania and the City of New York hereby consent to the motion of

the State of Delaware to intervene, and to file its answer to the amended petition of the City of New York for modification of the aforesaid decree of May 25, 1931.

STATE OF NEW JERSEY,
Complainant

By: GROVER C. RICHMAN
Attorney General of the
State of New Jersey

STATE OF NEW YORK,
Defendant

By: NATHANIEL GOLDSTEIN
Attorney General of
State of New York

CITY OF NEW YORK,
Defendant

By: ADRIAN P. BURKE
Corporation Counsel for
the City of New York

COMMONWEALTH OF PENNSYLVANIA,
Intervenor

By: FRANK F. TRUSCOTT
Attorney General of the
Commonwealth of Pennsylvania

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Intervenor.

ON PETITION OF CITY OF NEW YORK TO AMEND DECREE, ANSWER AND BRIEF OF THE STATE OF NEW JERSEY.

THEODORE D. PARSONS,
Attorney General of New Jersey,
Solicitor for Complainant and Respondent to Petition, State of New Jersey.

ROBERT PEACOCK,
Deputy Attorney General,
Of Counsel.

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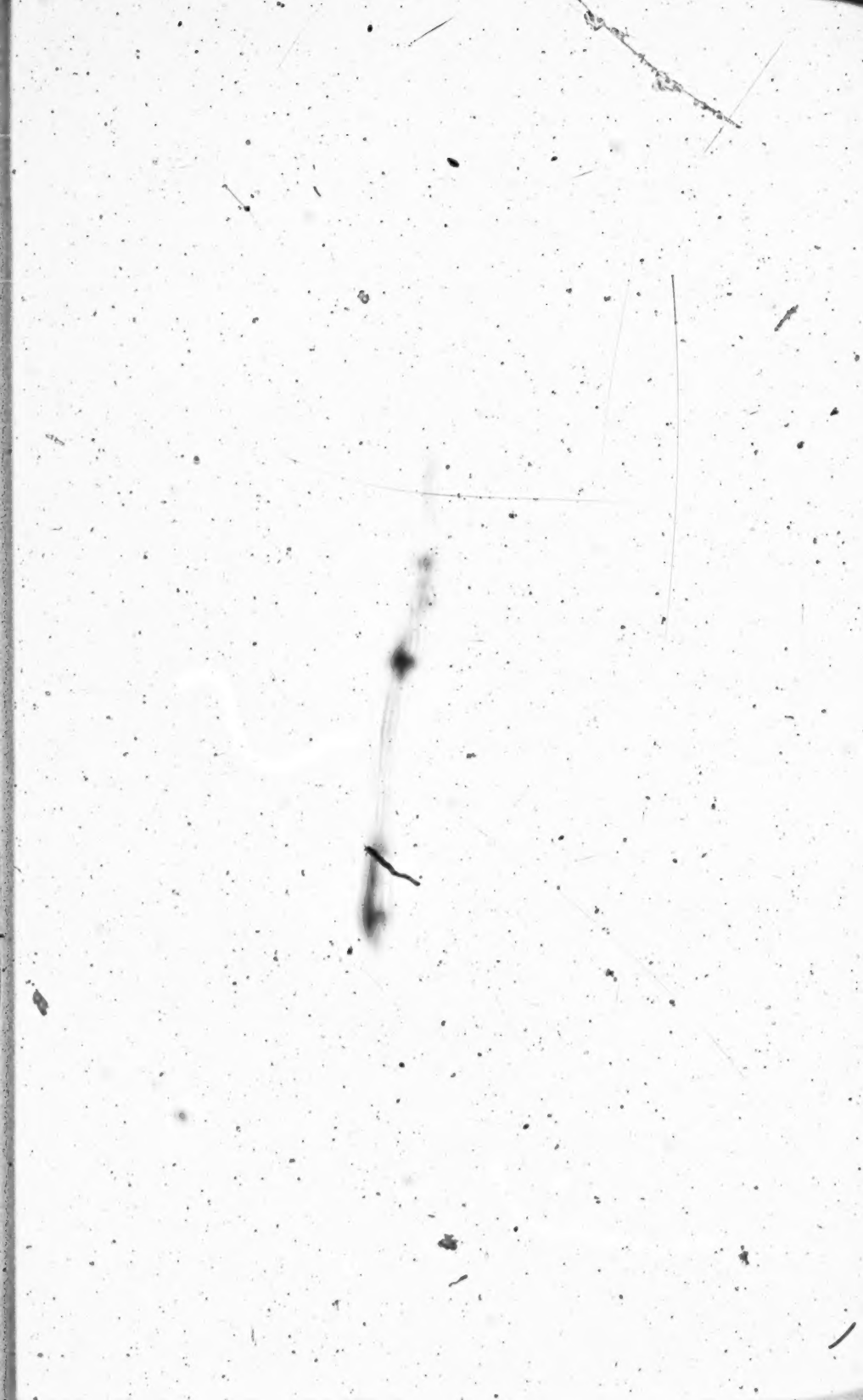

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Complainant,
against
STATE OF NEW YORK and CITY OF NEW YORK,
Defendants,
COMMONWEALTH OF PENNSYLVANIA,
Intervenor.

Motion for Leave to File Petition, Petition to Amend Decree.

ANSWER OF STATE OF NEW JERSEY.

Now comes the State of New Jersey, by Theodore D. Parsons, its Attorney General, and answers the petition of the City of New York filed in the above cause.

1. The State of New Jersey admits the jurisdiction of this Court in the premises.

2. The State of New Jersey will not object to the increase of waters for the City of New York, if the Court by its decree will designate the amount of water to be released by the City of New York impounded by its plan as set forth in this petition in order to supply sufficient water to the State of New Jersey for potable and industrial purposes and to protect oysters and wild life and recreational facilities of the State of New Jersey.

3. Under the present plan submitted by the City of New York, the State of New Jersey will show that substantial damage would be caused to the State of New Jersey and its citizens by said proposed diversion.

The action in which it is sought to modify the decree heretofore entered in this case arose from a suit brought by the State of New Jersey against the State of New York and City of New York, when the city and state attempted to take from the Delaware River 600 m.g.d. The case was submitted to the Court, referred to a master, the master made his report, opinion was given by Justice Holmes, and decree entered allowing the defendants to use the equivalent of 440,000,000 of water per day.

In Justice Holmes' opinion he held:

> "New Jersey alleges that the proposed diversion will transgress its rights in many respects. That it will interfere with the navigability of the Delaware without the authority of Congress or the Secretary of War. That it will deprive the state and its citizens who are riparian owners of the undiminished flow of the stream to which they are entitled by the common law as adopted by both states. That it will injuriously affect water power and the ability to develop it. That it will injuriously affect the sanitary conditions of the river. That it will do the same to the industrial use of it. That it will increase the salinity of the lower part of the river and of Delaware Bay to the injury of the oyster industry there. That it will injure the shad fisheries. That it will do the same to the municipal water supply of the New Jersey towns and cities on the river. That by lowering the level of the water it will injure the cultivation of adjoining lands; and finally, that it will injuriously affect the river for recreational purposes."

4. The answer now filed is to ask this Court to give protection to the State of New Jersey on the questions set forth above.

5. New Jersey has a large oyster industry with thousands of dollars invested and low water flow will cause marine enemies of the oyster to destroy it. The natural

beds of Delaware Bay exist in their present location because of the contribution made to the biology of the oyster by fresh water discharge in the Delaware River and high spring flow serves to keep the enemies from establishing a permanent foothold there. Hence, oysters are able to attach and grow to a size suitable for transplanting unmolested by enemies and planted beds enjoy conditions favorable to the maturing of the oysters by reason of the influence of fresh water discharged first, by holding back the flood tide and diluting the more saline waters; and, second, the effect of river discharge diluting off-shore waters from which the flood tide is drawn. The industry has existed for more than two centuries and is the sole means of support of the communities in which it is carried on. So that the diversion of water as proposed by petitioner will remove from the Delaware River basin fresh water needed

(1) to supply low salinity and chemicals necessary for attachment of oyster larva;

(2) bring about reaction to the ebb and flow of tides which will carry larva upstream to natural beds;

(3) supply food to the oysters;

(4) limit the sphere of activity of marine enemies;

(5) supply heat needed for the purpose of development of the eggs;

(6) reduce the flow of the river and reduce the salinity in a mass of water detrimental to the oyster industry.

6. In addition to the above, New Jersey would suffer substantial damage to its water power, industrial uses, sanitation, municipal water supply, agriculture and recreation, and may cause insanitary conditions in the river.

7. The City of New York, under paragraph 3, page 3 of its petition, submits a plan contemplated for the development of 600 m.g.d. of water of these tributaries in three stages and asks the Court to modify the original decree

by inserting the formula set forth on page 9, paragraphs 20, 21 and 22, which is the formula agreed to between the States of New York, New Jersey, Pennsylvania and Delaware under Chapter 212 of the Laws of 1944 of New Jersey.

8. Subsequent to that compact it was found necessary to further explore the question concerning the Delaware River and by Chapter 283 of the Laws of 1951 an act to provide for joint action by the States of Delaware, New York, New Jersey and the Commonwealth of Pennsylvania in developing, utilizing, controlling and conserving the water resources of the Delaware River basin and to secure an adequate water supply was passed. This act is known as Chapter 283, Laws of 1951, New Jersey, and was approved by the Governor of this State on June 25, 1951. A similar act was passed by the State of New York and is known as Chapter 701, Laws of 1952, New York, which was approved by the Governor of that State on April 15, 1952. The State of Delaware also passed in 1951 an act similar to the act passed by New Jersey and New York, and Pennsylvania has not at this time passed such an act.

9. Under the terms of the new compact it is provided:

> "There is created hereby a body corporate and politic with perpetual succession, to be known as The Delaware River Basin Water Commission (hereinafter in this compact referred to as the commission), which shall constitute a public corporation instrumentality of the Commonwealth of Pennsylvania and of the States of New Jersey and New York (and of the State of Delaware if and when Delaware becomes a signatory State), and of each of them, to exercise an essential governmental function of each of the signatory States, for the purposes of developing, utilizing, controlling, and conserving the water resources of the Delaware river basin in order to assure an adequate water supply.

* * * * *

"A majority of the commissioners from the signatory States shall constitute a quorum for the transaction of business at any meeting of the commission. No action shall be taken by the commission except by a favorable vote of a majority of the commissioners present at such meeting; provided, however, that no action of the commission concerning any allocation of water for water supply shall be binding unless a majority of the commissioners from each of the signatory States shall have voted in favor thereof.

"To determine and to allocate, subject to the provisions of paragraph two of Article III, to each of the signatory States an equitable apportionment of available water supply in order to meet domestic and industrial requirements of political subdivisions and metropolitan areas therein.

"to release, subject to the provisions of Article IX, the quantity of water required to be released from storage in order to maintain an adequate minimum flow in the Delaware river during periods of low flow therein for the protection of public health, for the benefit of industry and of fisheries, such as oysters, clams and other shellfish, for animal and aquatic life, for recreation, for general sanitary conditions, for the dilution and abatement of pollution, and for the prevention of undue salinity.

"to provide for such other uses of the water and water resources of the Delaware river basin as navigation, flood control, production of hydro-electric power, and related uses, and to cooperate with other appropriate agencies for that purpose. * * *."

10. By the terms of the new legislation above referred to, waters were to be released in the Delaware River compensating said river where waters had been impounded or used by the petitioner to protect the State of New Jersey as above complained. That provided as follows:

"No signatory State shall permit the flow in the Delaware river to be diminished by the diversion of any water from the main channel of the Delaware river during any period in which waters are being released from storage reservoirs constructed under the provisions of this compact for the purpose of maintaining an adequate minimum flow in the Delaware river during the periods of low flow therein, except in cases where such diversion shall have been duly authorized under the provisions of this compact.

"The commission shall release water from storage for the purpose of maintaining an adequate minimum flow in the Delaware river during periods of low flow therein in accordance with the following provisions:

(a) Upon and after completion of a storage reservoir on the West Branch of the Delaware river near Cannonsville, New York, sufficient water shall be released from the aforesaid reservoir to maintain a minimum flow in the Delaware river, as measured at the stream gaging station at Port Jervis, New York, of at least one thousand eight hundred cubic feet per second.

(b) Upon and after completion of storage reservoirs on the West Branch of the Delaware river near Cannonsville, New York, on the main channel of the Delaware river near Barryville, New York, and on the Neversink river near Godeffroy, New York, sufficient water shall be released from the system consisting of the three aforesaid reservoirs to maintain a minimum flow in the Delaware river, as measured at the stream gaging station at Trenton, New Jersey, of at least four thousand cubic feet per second.

(c) Upon and after completion of storage reservoirs on the West Branch of the Delaware river near Cannonsville, New York, on the main channel of the Delaware river near Barryville, New York, on the Neversink river near Godeffroy, New York, and on

the main channel of the Delaware river near Wallpack Bend, sufficient water shall be released from the system consisting of the four aforesaid reservoirs to maintain a minimum flow in the Delaware river, as measured at the stream gaging station at Trenton, New Jersey, of at least four thousand eight hundred cubic feet per second.

"The intent and purpose of the requirements of paragraphs (b) and (c) of this article are to provide for a flow at all times of at least four thousand cubic feet per second, or at least four thousand eight hundred cubic feet per second, as the case may be, from the nontidal section of the Delaware river above Trenton into the tidal section of the Delaware river below Trenton. Accordingly, the requirements for the flow of at least four thousand cubic feet per second, or at least four thousand eight hundred cubic feet per second, at Trenton may be reduced by the commission in such a manner as to carry out this intent and purpose in the event the commission is called upon to utilize a part of the waters which would otherwise flow in the Delaware river at Trenton as a source of water supply for the city of Philadelphia and other political subdivisions and metropolitan areas in the greater Philadelphia-South Jersey area which are situated wholly within the Delaware river basin."

11. Under the plan contemplated by petitioner in its petition, the reservoir at Cannonsville is thirteen feet lower in height than the one contemplated under the compact passed by New Jersey, June, 1951, yet the reservoirs and impounding of water and the release of stored water as set forth in the compact of 1951 and 1952 would give to New York the amount of water applied for and protect New Jersey and the other States along the Delaware.

12. Before any diversion above 440 million gallons daily shall be made by or allowed to the City of New York under

this decree, it shall first construct its dam at Cannonsville to such height as shall provide for its storage of water in the amount recommended in the plans for development of the Delaware River watershed by the Interstate Commission on Delaware River Basin known as the Incodel project or plan and being more particularly described as follows:

Stage 1 of the project is comprised of the following elements:

(1) A storage reservoir on the West Branch of the Delaware River at Cannonsville with a total capacity of 118 billion gallons. This reservoir would be used primarily for the purpose of furnishing water in order to increase low river flows in the entire length of the river.

(2) A diversion dam on the main River near Barryville holding about 10 billion gallons. The major purpose of this dam will be to permit the diversion of flood-flows for water supply and stream flow regulation.

(3) A storage reservoir with a total capacity of 278 billion gallons on the lower Neversink River and on Basher Kill extending from Godeffroy to Phillipsport. The principal function of this reservoir will be to store the flood flows which are captured at Barryville and transported there-from by tunnel connection between the two structures.

(4) A transmission tunnel from the upper part of Godeffroy Reservoir to New York City's existing main supply tunnels in Brooklyn. From this common transmission tunnel, connections would be made to the major water supply systems of Northern New Jersey.

(5) A storage reservoir on the Main River at Wallpack Bend with a total capacity of 121 billion gallons. This reservoir is not included in Alternate A of Stage 1, which would provide stream flow regulation equivalent to a minimum of 4,000 cubic feet per second at Trenton. Wallpack Bend Reservoir is, however, included in Alternate B of Stage 1, which provides stream flow regu-

lation equivalent to a minimum of 4,800 cubic feet per second at Trenton.

13. The compact for the development of the Delaware River waters adopted by the Legislatures of the States of New York, Delaware and New Jersey, now being studied by the Commonwealth of Pennsylvania, commonly known as the Incodel Plan for the development of the Delaware River waters, more particularly described above, which if it shall also be adopted by the Commonwealth of Pennsylvania and shall be approved by the Congress of the United States will thereafter control the use, diversion and division of such waters. Any of the parties hereto shall have leave to apply to this Court for the acquisition under such compact of the waterworks permitted under this decree of this court in this proceeding on such payment and such other reservations as shall be set forth in the said compact and if not so set forth on such terms as the Court shall fix; and that thereupon the said compact shall be deemed to be the final decree of this Court in this proceeding with respect to the rights of the various parties to the development and use of the waters of the Delaware River.

14. The adoption of the release formula set forth in the petition will not further improve conditions in the Delaware, particularly in the driest season, to the greater benefit of the users below the points of proposed diversion.

CONCLUSION.

1. Respondent, New Jersey, requests the court, before relief is granted that a formula for released waters from the reservoirs to be constructed, be the program as permitted under Chapter 283, Laws of 1951 of New Jersey and Chapter 701, Laws of 1952 of New York.

2. That this court designate the respective rights as to the amount of water to be diverted by New Jersey and New

York upon completion of said construction program as outlined in the two aforesaid acts.

3. Before any diversion about 440 m.g.d. shall be made or allowed to New York, this Court compel New York City to raise the dam and reservoir 13 feet to provide for storage of water in the amount recommended in the plans for the development of the Delaware River in the aforesaid acts, and the Incodel Plan.

4. That the formula for released waters be in accordance with said formula of the 1951 New Jersey and the 1952 New York compact, and the Incodel Plan.

5. That this Court shall determine the respective rights of the States of New York, New Jersey and the City of New York in and to surplus waters claimed by the adoption of the Incodel Plan, 1951 Compact of New Jersey and 1952 Compact of New York and the cost which the respective States shall pay for the creation of such additional water supply.

6. That the State of New Jersey have the right to inspect the diversion area, the dams, reservoirs and other works constructed by the City of New York, inspect meters and other apparatus installed by the City and all records pertaining to inflow, outflow and diverted flow.

7. That the diversion area shall not constitute prior appropriation and shall not give to the State of New York and the City of New York any superiority of right over the State of New Jersey in the enjoyment and use of the Delaware River and its tributaries.

8. That petitioner be compelled to adopt the formula for released or stored waters and for the construction of dams and reservoirs and for flow down the Delaware River as set forth in the 1951 Compact of New Jersey and the 1952 Compact of New York.

9. That the Court will decree and determine and allocate, an equitable apportionment of available water supplies in order to meet domestic and industrial requirements of political subdivisions or metropolitan areas therein and to release the quantity of water required to be released from

storage in order to maintain an adequate minimum flow in the Delaware River during periods of low flow therein and protect public health, industries, fisheries, oysters, recreation, general sanitary conditions and for the abatement of pollution and for the prevention of undue salinity.

10. That the Court decree the rights of New Jersey for the use of water for the Delaware and Raritan Canal and Feeder in accordance with Chapter 121, Laws of 1944, adopted and accepted by New York and New Jersey by Chapter 283, P. L. 1951 of New Jersey, page 1010 and Chapter 701 of the Laws of New York for 1952.

11. Respondent requests and reserves the right to supplement or amend this answer, concerning the Cannonsville project or the compensation flow at the Trenton gaging station.

Respectfully submitted,

THEODORE D. PARSONS,
Attorney General of New Jersey,
Solicitor for Complainant and Respondent to Petition.

ROBERT PEACOCK,
Deputy Attorney General,
Of Counsel.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1950

No. 5, Original.

STATE OF NEW JERSEY, *Complainant,* *against* STATE OF NEW YORK and CITY OF NEW YORK, *Defendants,* COMMONWEALTH OF PENNSYLVANIA, *Intervenor.*	On Motion for Leave to File Petition and Amend Decree.

BRIEF FOR THE STATE OF NEW JERSEY.

1. This memorandum is submitted in opposition to the claim of the City of New York on the present plan contemplated by the petitioner in this cause.

2. The State of New Jersey does not object to the increase of water for the City of New York if the Court by its decree will designate the amount of water to be released by the City of New York in order to supply sufficient water to the State of New Jersey for potable and industrial purposes and to protect oysters, wild life and recreational facilities of the State of New Jersey. The present plan of the City of New York to use 800 m.g.d. without sufficient compensation waters let down to the Delaware River would cause irreparable damage to the residents and industries of the State of New Jersey.

3. In the original cause before this Court, Justice Holmes held that New Jersey alleged that the proposed diversion

would interfere with the navigability of the Delaware without the authority of Congress, and deprive the State and its citizens, who are riparian owners, to the undiminished flow of the stream to which they are entitled by common law adopted by both States. That it would affect water power and the ability to develop it. That it would affect the sanitary conditions of the river. That it would also cause damage to industrial use of the water in said river and increase the salinity of the lower part of the river and Delaware Bay to the injury of the oyster industry. That by lowering the level of the water, it would injure the cultivation of adjoining lands and injuriously affect the river for recreational purposes.

4. The Delaware River Basin is described as follows:

"A. The Delaware River Basin and the adjoining territory to which it is economically attached have aptly been referred to as the heart of the northeastern section of the United States. This all-important river system occupies a part of each of four of the nation's important industrial states—New York, New Jersey, Pennsylvania and Delaware.

"B. Thirty million people, over twenty percent of the population of the country, reside in these states. More than five million live within the Basin. Ten million, largely in the metropolitan areas of greater New York City and of northeastern New Jersey live within less than two hours driving distance of the Basin.

"C. The Delaware River Basin is one of the nation's most useful and valuable major river watersheds, now and potentially. From its headwaters in the Catskill Mountains in New York, the Poconos in Pennsylvania and the Kittatinny Mountains in New Jersey, its water and land resources constitute valuable assets of the region and the nation.

"D. The upper one-third of the Basin's 12,757 square miles is renowned for its scenic beauty and

recreational assets. It is an unsurpassed source of potable water.

"E. The central section, extending from Delaware Water Gap to Trenton, comprises a region which is predominantly agricultural. It includes the Lehigh River Valley, noted for its anthracite fields and its steel and cement industries.

"F. The portion of the Basin from Trenton to Wilmington encompasses one of the largest and most strategically situated fresh water harbors in America. Here is located one of the most highly diversified and productive industrial areas in the world. Water supply and river regulation adequate to attract industrial expansion will hasten the pace of its further development. Below Wilmington, as the river widens to form Delaware Bay is an oyster production area of historic and outstanding value on both the New Jersey and Delaware shores. This industry has operated continuously for over 100 years.

"G. The West and East Branches of the Delaware River rise on the western slopes of the Catskill Mountains and flow southwesterly to make right angle turns in a valley descending southeasterly to Port Jervis. In this valley the West Branch is joined by the East Branch near Hancock to form the beginning of the main Delaware River. From its beginning to the mouth of Delaware Bay south of Cape May, the flowing waters travel a distance of 326 miles to mix with the waters of the Atlantic Ocean.

"H. From its source to Port Jervis the Delaware River is the boundary between New York and Pennsylvania, next between Pennsylvania and New Jersey and last between New Jersey and Delaware all the way to the mouth of Delaware Bay.

"I. The main channel of the Delaware River at Hancock is about 890 feet above sea level. It descends southeasterly to elevation 420 feet at Port Jervis where it is joined by the Neversink River flowing south-

westerly from Godeffroy in the flat valley lying northwest of the Shawungunk Mountains. Descending southwesterly to Wallpack Bend, the River cuts southwesterly through a limestone ridge on the northwest slope of the Kittatinny Mountains, then continues to flow southwesterly to Stroudsburg where it makes another right angle turn and cuts through the mountains to form Delaware Water Gap. Below the Gap the River meanders through lower lands, receives the Lehigh River waters between Easton and Phillipsburg, then cuts southeasterly across various rock ridges to elevation 40 immediately above Trenton Falls.

"J. Below the Falls, on a line that bears southwesterly from the north shore of Long Island Sound through Trenton, Philadelphia and Wilmington to Chesapeake Bay, the continental base rocks dip southeasterly below sea level and all lands lying between this line and the Atlantic Ocean are composed of gravels, sands and clays deposited on the rock from the outwash of melting glaciers. These lands include Long Island, most of Staten Island, all of New Jersey southwest of Raritan Bay and all of Delaware except about 200 square miles of the northern tip of the state. They provide ground water storage reservoirs continually replenished from the rainfall on their surfaces.

"K. Below Trenton the River makes another right angle turn to flow southwesterly, along the line of base rocks dip below sea level, into the northwest end of Delaware Bay. This section of the River and Delaware Bay form the natural tidal estuary of the Delaware River."

5. The State of New Jersey desires the plan proposed by the Compact of 1951 and 52 by New York, Delaware and New Jersey rather than the formula set forth in the 1944 Compact referred to in the City of New York's petition for

modification of the decree, because on page 46 of the petition its sets forth, "It is a well known fact that it requires a period of at least fifteen years to complete a project of this magnitude."

6. If that is correct, the Incodel Plan, which New York has agreed to could be completed within less time, and be more equitable to the States concerned.

7. The plan described in the petition is not the most feasible and practical plan for the City of New York, State of New York and State of New Jersey because it does not provide sufficient flow down the Delaware River to protect the Delaware River, as heretofore set forth, and New Jersey requests a decree from this Court in accordance with the Master's Report (pages 186-187) in which it states:

> "The waters of the Delaware River and its tributaries should be fairly and equitably apportioned among the three states according to their present and reasonable future needs."

8. Under the Compact of 1944 (Chapter 121, Laws of New Jersey 1944) which was adopted by New York, the formula set forth therein, as requested by New York, would be detrimental to the State of New Jersey unless there was a sufficient flow of water down the Delaware to take care of industrial water supplies, oysters and recreational needs. The City of New York should adopt the formula as set forth in the compact passed by Delaware, New York and New Jersey.

9. The New Jersey Compact is found in Chapter 283 of the Laws of 1951 and the compact in substance was passed by New York (Chapter 701, Laws of 1952) and approved by the Governor of New York on April 15, 1952. (The Incodel Plan.) That provides as follows:

> "No signatory state shall permit the flow in the Delaware River to be diminished by the diversion of any water from the main channel of the Delaware river dur-

ing any period in which waters are being released from storage reservoirs constructed under the provisions of this compact for the purpose of maintaining an adequate minimum flow in the Delaware river during the periods of low flow therein, except in cases where such diversion shall have been duly authorized under the provisions of this compact.

"The commission shall release water from storage for the purpose of maintaining an adequate minimum flow in the Delaware river during periods of low flow therein in accordance with the following provisions:

(a) Upon and after completion of a storage reservoir on the West Branch of the Delaware river near Cannonsville, New York, sufficient water shall be released from the aforesaid reservoir to maintain a minimum flow in the Delaware river, as measured at the stream gaging station at Port Jervis, New York, of at least one thousand eight hundred cubic feet per second.

(b) Upon and after completion of storage reservoirs on the West Branch of the Delaware river near Cannonsville, New York, on the main channel of the Delaware river near Barryville, New York, sufficient water shall be released from the system consisting of the three aforesaid reservoirs to maintain a minimum flow in the Delaware river, as measured at the stream gaging station at Trenton, New Jersey, of at least four thousand cubic feet per second.

(c) Upon and after completion of storage reservoirs on the West Branch of the Delaware river near Cannonsville, New York, on the main channel of the Delaware river near Barryville, New York, on the Neversink River near Godeffroy, New York, and on the main channel of the Delaware river near Wallpack Bend, sufficient water shall be released from the system consisting of the four aforesaid reservoirs to maintain a minimum flow in the Delaware river, as

measured at the stream gaging station at Trenton, New Jersey, of at least four thousand eight hundred cubic feet per second.

"The intent and purpose of the requirements of paragraphs (b) and (c) of this article are to provide for a flow at all times of at least four thousand cubic feet per second, or at least four thousand eight hundred cubic feet per second, as the case may be, from the nontidal section of the Delaware river above Trenton into the tidal section of the Delaware river below Trenton. Accordingly, the requirements for the flow of at least four thousand cubic feet per second, or at least four thousand eight hundred cubic feet per second, at Trenton may be reduced by the commission in such a manner as to carry out this intent and purpose in the event the commission is called upon to utilize a part of the waters which would otherwise flow in the Delaware river at Trenton as a source of water supply for the city of Philadelphia and other political subdivisions and metropolitan areas in the greater Philadelphia-South Jersey area which are situated wholly within the Delaware river basin."

(Chap. 283, Laws of New Jersey 1951.)

10. New Jersey regards this plan to be a more equitable apportionment of water than the formula set forth in petitioners' petition and could be adopted by New York, New Jersey and Pennsylvania, providing sufficient water for the three States and the City of New York without jeopardizing the rights of any of the parties.

11. As set forth in the answer, the parties shall release, subject to the provisions of said compact, the quantity of water required to be released from storage in order to maintain an adequate minimum flow in the Delaware River during periods of low flow therein for the protection of public health, for the benefit of industry and fisheries, such

as oysters, clams and other shellfish, for animal and aquatic life, for recreation, for general sanitary conditions, for the dilution and abatement of pollution, and for the prevention of undue salinity, and provide for such other uses of the Delaware and Delaware River Basin, such as flood control, production of hydro-electric power, and related uses, and co-operate with other appropriate agencies for the purpose. (Adopted in part by New York.) (Chapter 283, Laws of 1951, p. 989.)

12. The City of New York, in its application for the diversion of these waters, could protect New Jersey and other States by raising the reservoir and dam at Cannonsville thirteen feet higher than the one proposed under the project referred to in its petition. The reservoir, impounding of water and release of stored water would give to New York the amount New York applied for and protect New Jersey and other States along the Delaware River. The cost given by the State of New York for a reservoir and dam thirteen feet less in height is as follows:

NEW YORK CITY ESTIMATE

	New Sources	*Differences*
Reservoir	$19,238,000	$2,793,000
Dam	6,408,000	369,500
Div. & Over.	14,200,000	6,225,000
Effluent Chan.	6,050,000	6,050,000
Fencing and Planting	980,000	980,000
	$46,876,000	$16,417,500
Contingencies (15%)	4,687,000	4,349,498
Admin. (10%)	7,734,000	
Total	$59,297,000	$20,766,998

13. This amounts to a total of $59,297,000 and under the Incodel Plan submitted under the Compact of 1951-52 the same reservoir and dam could be built thirteen feet higher and give protection to the State of New Jersey and adequate water supplies to New York City at a cost as follows:

ENGINEERS OF INCODEL ESTIMATE

Reservoir	$16,445,000	
Dam	6,038,500	
Div. & Over.	7,975,000	
Effluent Chan.	0	
Fencing and Planting	0	
	$30,458,500	
Contingencies (15%)	4,568,775	(10%)
	$35,027,275	
Admin. (10%)	3,502,727	(15%)
Total	$38,530,002	

This amounts to $38,530,002.

14. The Cannonsville project proposed by the City of New York would then be modified to raise the flow line of the reservoir from elevation 1,150 feet above mean sea level and a capacity of about 97 billion gallons, to a flow line elevation 1,163 feet above mean sea level and a capacity of about 118 billion gallons as proposed in the Pirnie plan.

15. The additional storage capacity provided by this increased elevation would be utilized for compensation flow over and above that required by the Incodel rule of release (Chapter 121, N. J. Laws of 1944, Article IV) and to provide for a water supply which may be diverted from the channel of the Delaware River below Port Jervis, New York by the State of New Jersey.

16. By the opinion of Justice Holmes, which is Appendix A of the City of New York's application to this Court, when New York requested 600 m.g.d. and was granted 440 m.g.d., the Court said:

> "New Jersey alleges that the proposed diversion will transgress its rights in many respects. * * * That it will deprive the State and its citizens who are riparian owners of the undiminished flow of the stream to which they are entitled by the common law as

adopted by both States. That it will injuriously affect water power and the ability to develop it. That it will injuriously affect the sanitary conditions of the river. That it will do the same to the industrial use of it. That it will increase the salinity of the lower part of the river and Delaware Bay to the injury of the oyster industry there."

17. If New York is allowed to increase from 440 m.g.d. to 800 m.g.d. without a greater compensation flow in the Delaware River these same conditions related by the Court above would be of greater magnitude than when this case was before the Court on a previous occasion.

18. Many years ago, New Jersey decided that the Delaware River was a common highway for improving navigation of the river and adopted an act declaring the Delaware River a common highway and for improving the navigation of said river on December 21, 1771 (Allison's Laws, 347) and has continued to be a highway to the present time. It has been used for a long period of time for navigation and must be regarded as navigable. In fact, the long continued use of the stream may, of itself, constitute such evidence of navigability that it cannot be disputed. *Woolrych, Waters,* pp. 42, 411; *Shaw* vs. *Crawford,* 10 Johns. (N. Y.) 237; *Pierrepont* vs. *Loveless,* 72 N. Y. 216.

19. New Jersey contends that the Compact passed by New Jersey and Delaware in 1951 and New York in 1952 is the formula to be adopted by the Court, because it supersedes the formula set forth in the Acts of 1944 between New York and New Jersey and gives greater protection to the State of New Jersey and the users of the Delaware River.

20. The adoption of these Compacts by New York and New Jersey is equivalent to declaration of State policy. New York in accepting the rights conferred by these Compacts has admitted the right of New Jersey, because New Jersey is entitled to water and has an inherent right to gain a water supply from this stream. These rights can be given by compact.

"To admit that the people of the State of New York have any inherent right to gain a water supply from the lakes or streams of New Jersey by means of an artificial aqueduct constructed for the purpose is to assert that the sovereignty of New York extends to some extent and for such purposes over the soils of New Jersey. To state the proposition is to refute it. Such interstate rights can be acquired only by interstate compact." *McCarter* vs. *Hudson County Water Co.*, 79 N. J. Eq. 695, 717; (N. J. E. & A.); aff. 209 U. S. 349.

21. The primary use of the waters of the basin and river is for water supply, and the second highest use is for stream flow regulation. According to the decision of the United States Supreme Court, a reservoir constructed in a river basin for the purpose of diverting water for use outside the basin, such as providing additional water supply for northeastern New Jersey and New York City, must make provision for the release of compensating water at times of low stream flows. The quantity indicated by the Court as reasonable and equitable for this purpose actually will be less than that believed to be desirable to improve existing adverse conditions that occur during periods of low runoff because the releases are applicable to only a small portion of the drainage area. For example, when 440 million gallons daily is diverted to New York City, the Supreme Court decree required the release of a maximum of 307 cubic feet per second from the East Branch and Neversink Reservoirs. This release would raise a summertime natural flow in the Delaware River of 2,000 cubic feet per second to only 2,307 cubic feet per second, whereas the compensation flow formula of 51-52 compacts would raise this flow to 4,000 cubic feet per second.

22. This is an improvement. But, the increase is far from being sufficient to make an appreciable contribution of clean river water to dilute polluted waters in the lower sections of the Delaware River and flood tide intrusion of

ocean water into the saline waters of Delaware Bay. Nor would it contribute noticeably to reduction of salinity of the estuary between Philadelphia and the Delaware-Pennsylvania State line. What is needed for these purposes and for the enhancement of recreational facilities with resulting appreciation of property values along the river, is river regulation water to maintain flows sufficiently high to create more strikingly improved conditions so greatly desired during the summer and fall seasons.

23. New Jersey requests that, before relief is granted to the City of New York, under paragraph 19 of its petition, by way of modification of paragraph 1, Subdivision B of said decree of May 25, 1931, a formula for released water from the reservoirs to be constructed under the program of the City of New York or the Incodel program as permitted by the present decree, be amended to augment low flows downstream in the river as set forth in the formula for released waters under the Compact (Chapter 283, Laws of New Jersey 1951).

24. Further that this Court designate the respective rights as to the amount of water to be diverted by New York and New Jersey upon completion of the said construction program as outlined under the aforesaid act, and that the said water release formula be in accordance with the 1951 Compact.

25. Before any diversion above 440 m.g.d. shall be made by or allowed to the City of New York it shall first construct its dam at Cannonsville to such a height as shall provide for its storage of water in the amount recommended in the plans for development of the Delaware River watershed by the Incodel Commission on the Delaware River Basin, set forth in the answer of New Jersey.

26. That the formula for released waters and the diversion of waters hereafter be in accordance with said formula of the 1951 Compact, and that any parties may have leave to apply to this Court for the acquisition under such compact of the water permitted under the same on payment for the amount of waters used. New Jersey also

asks that such other reservations as shall be set forth in said compact and, if not now so set forth, be set forth on such terms as the Court shall fix.

27. In case Pennsylvania does not pass the compact that has been passed by New York, Delaware and New Jersey, New Jersey asks that this Court shall determine the respective rights of the States of New York and New Jersey and the City of New York in and to surplus waters claimed by the adoption by the City of New York of the Incodel plan set forth in the 1951 Compact and determine the cost which the respective States shall pay for the creation of such additional water supply.

28. New Jersey shall, at all times, have the right to inspect dams, reservoirs and other works constructed by the City of New York; inspect the diversion area; inspect meters and other apparatus installed by the City of New York and inspect all records pertaining to inflow and outflow and diverted flow.

29. New Jersey further requests the Court direct that the diversion area shall not constitute prior appropriation and shall not give to the State of New York and City of New York any superiority of right over the State of New Jersey, in the enjoyment and use of the Delaware River and its tributaries, and that this Court compel New York to adopt the formula set forth for the release of stored waters and for the construction of dams and reservoirs as set forth in Chapter 283 of the Laws of New Jersey for 1951 and Chapter 701 of the Laws of New York for 1952, or such formula as shall be equitable in the premises.

30. That the Court determine and allocate, subject to the provisions of the above compacts, an equitable apportionment of available water supplies in order to meet domestic and industrial requirements of political subdivisions or metropolitan areas therein and to release, subject to the provisions of said compacts, the quantity of water required to be released from storage in order to maintain an adequate minimum flow in the Delaware River during periods

of low flow therein and protect public health, industries, fisheries, oysters, recreation, general sanitary conditions and for the abatement of pollution and for the prevention of undue salinity.

31. New Jersey requests this Court decree that said decree shall in no wise change, affect, or impair the diversion of water of the Delaware River in and through the Delaware and Raritan canal and feeder in accordance with the following law:

> "Existing rights preserved. The passage of this act shall in nowise change, affect or impair the diversion of the waters of the Delaware river in or through the Delaware and Raritan canal and feeder as at any time heretofore or the use of such water so diverted for a domestic or industrial water supply or any other purpose; provided, that the amount diverted shall not exceed the amount at any time heretofore diverted either in or out of the Delaware basin; and nothing in this act shall affect or impair other existing rights in the Delaware river, if any of the State of New Jersey or any agency of political subdivision thereof." (Chapter 121, Laws of 1944.)

New York passed this act in substance and stated: "This act shall not impair or affect any valid rights existing at the time it takes effect."

This act is still in effect because the Compact of 1951 and 1952 of New Jersey and New York did not change the provisions of the 1944 act above stated.

Chapter 283, Laws of 1951, page 1010 states: "Nothing in the existing compact between two or more signatory states shall be impaired or invalidated by any of the provisions of this compact." Chapter 283, Laws of 1951, page 1010.

New York agreed to the same reservation: "Nothing in any existing compact between two or more of the signatory

states shall be impaired or invalidated by any of the provisions of this act." Chapter 701, Laws of 1952 of New York.

Respectfully submitted,

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